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In the Supreme Court of the United States

October Term, 1978

No. 78-1679

CANAL BARGE COMPANY, INC.,

Petitioner

vs.

PPG INDUSTRIES, INC., and
ASHLAND OIL COMPANY—
THOMAS PETROLEUM TRANSIT DIVISION,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
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The petitioner, Canal Barge Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 29, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Court of Appeals), not yet reported, appears in Appendix A hereto. The denial of a timely petition for rehearing en banc by the Court of Appeals appears in Appendix B hereto. The memorandum opinion and order of the United States District Court for the Western District of Pennsylvania (District Court), reported at 438 F. Supp. 1238, granting the motion of PPG Industries, Inc. for judgment notwithstanding the verdict appears in Appendix C hereto. The Order of the District Court, not reported but including citation of authority, denying the motion of Canal Barge Company, Inc. to alter or amend judgment notwithstanding the verdict appears in Appendix D hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 1978 (Appendix A). A timely petition for rehearing en banc was denied on February 5, 1979 (Appendix B), and this petition for certiorari was filed pursuant to 28 U.S.C. §2101(c) within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) which provides that cases in the Courts of Appeal may be reviewed by this Court "By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree".

QUESTIONS PRESENTED

1. Does the principle of national uniformity in the interpretation and enforcement of admiralty and maritime law require that the writ of certiorari herein requested be granted?

2. Does the split decision of the panel of the Court of Appeals present a serious and substantial conflict among the Circuit Courts of Appeal concerning the validity of marine insurance provisions under the rationale of *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 75 S. Ct. 629 (1955)?

3. Did the panel majority of the Court of Appeals utilize proper standards in determining:

   (a) The burden of proof with respect to cargo damage between carrier and shipper by requiring the carrier to prove *both* that cargo damage resulted from an excepted peril *and* that the carrier exercised due diligence to avoid the damage; and

   (b) That the trial court properly took the issue of unseaworthiness from the jury despite expert evidence on the record raising the factual issue of unseaworthiness?

STATUTES INVOLVED

The pertinent provisions of the Harter Act, 46 U.S.C. §§190, 191 and 192, and the pertinent provisions of the Carriage of Goods by Sea Act, 46 U.S.C. §§1302, 1303 and 1304, are set forth in full in Appendix E and F hereto.

STATEMENT OF THE CASE

This action is a civil action based on diversity of citizenship and jurisdictional amount which was brought by PPG Industries, Inc. (PPG) to recover for contamination of a water soluble anti-freeze cargo on a carriage of its goods on the inland waterways of the United States by Ashland Oil Company-Thomas Petroleum Transit Division (Ashland) and Canal Barge Company, Inc. (Canal) from Beaumont, Texas to St. Paul, Minnesota. Upon arrival the cargo of anti-freeze was found contaminated.

The carriage of these goods was based on a "Transportation Agreement" between PPG and Ashland wherein Ash-

land agreed to transport PPG's anti-freeze from Beaumont, Texas to St. Paul, Minnesota. The Transportation Agreement incorporated the limitations of liability under the Carriage of Goods by Sea Act, 46 U.S.C. §1300 et seq. In addition, the Transportation Agreement provided as follows:

> "13. Insurance. Hull and P&I Insurance will be carried with a first class underwriter by Carrier for Carrier's account. Cargo insurance will be assumed or carried by shipper for his own account with waiver of subrogation to the Carrier."

Ashland utilized a single skin barge consisting of a single sheet metal bottom, sides and deck, to transport the water soluble anti-freeze. It was uncontested at the trial that if a hole is made in the single skin hull, the water or other contaminant would go directly into the cargo compartment. The barge provided by Ashland was a typical inland river single skinned box barge containing six cargo tanks, the bottom of the cargo tanks being also the bottom of the barge. A double skinned barge on the other hand, is basically a box within a box, containing a void space or an air space between the bottom of the cargo tank and the bottom of the barge. The cargo of ethylene glycol anti-freeze was a water soluble cargo, made to mix freely with water.

Ashland entered into a contract with Canal to tow the barge for a portion of the carriage from a point selected by Ashland to St. Paul, Minnesota. This "Towing Contract" contained language substantially similar to the Transportation Agreement and incorporated §3 of the Harter Act (46 U.S.C. §192) into the towing contract. In addition the towing contract contained the following provision relative to insurance:

> "12. . . . The Equipment to be towed is to be covered to the full value thereof on the policies of both Hull and P&I Insurance by company B [Ashland] and company B shall obtain from underwriters a waiver of subrogation in favor of company A [Canal]."

Ashland subsequently towed the barge with its anti-freeze cargo from Beaumont, Texas to Baton Rouge, Louisiana, and thereafter, the barge was delivered to St. Paul, Minnesota by Canal. Throughout its handling by Canal, the barge was the middle barge in a string of barges.

A jury trial was held on the merits of PPG's claim. In the course of the trial, the District Court took from the jury the issue of the unseaworthiness of the barge, a single skinned barge, to transport a valuable, water soluble cargo such as ethylene glycol, despite evidence on the record by petitioner's expert that "valuable water soluble cargo such as ethylene glycol [anti-freeze] should be carried only in double skin barges" and that the cargo would not have been contaminated if a double skinned barge had been used. The District Court also refused to permit counsel for petitioner to cross-examine PPG's or Ashland's witnesses on the insurance provisions contained in their respective carriage of goods contracts, despite the fact that it was admitted on the record that PPG did not satisfy the condition and maintain the property insurance protection that was contractually required. The District Court subsequently ruled that the insurance provisions were invalid under the *Bisso* rationale.

The case was tried by the parties on the issue of whether or not the damage sustained to the barge was caused by an obstruction to navigation or peril of the sea, an excepted cause under the Harter Act and under the general maritime law. The District Court properly charged the jury on the legal doctrines of peril of the sea and obstructions to navigation, but it erroneously instructed the jury that if they found the damage to the barge and/or cargo was caused by a peril of the sea or an obstruction to navigation, that petitioner still retained the burden of persuasion or proof that it exercised due diligence following these incidents causing damage, to the end of the voyage.

The jury returned a verdict pursuant to instructions of the District Court in favor of petitioner and against PPG, indicating a finding by the jury that Canal had sustained its burden of establishing its due diligence up to the time of damage to cargo and barge by a peril of the sea, a submerged object. In special interrogatories addressed to the jury by the District Court, however, the Court asked the jury to name the party, if any, that failed to exercise due care from the time of the incident involving the obstruction to navigation the "topping incident", to the ultimate arrival of the cargo at St. Paul, Minnesota. The jury answered this special interrogatory that defendant Canal failed to exercise such due care and indicated further that the total amount of damages to the cargo was incurred after the topping incident. Such a finding was the result of the District Court's improper imposition of the burden of proof on Canal, the petitioner, rather than on PPG, as to due diligence following the damages sustained by the peril of the sea.

After the initial entry of judgment on the verdict of the jury in favor of your petitioner, the District Court granted PPG's motion for judgment n.o.v. (Appendix C), and further denied Canal's motion for a new trial and motion to alter or amend judgment n.o.v. by reinstating the judgment entered on the general verdict of the jury (Appendix D). The appeal to the Court of Appeals followed and resulted in the majority and dissenting opinions, F.2d (3rd Cir. 1978), which are set out in Appendix A.

REASONS FOR GRANTING THE WRIT

Your petitioner respectfully submits that the considerations of policy governing this Court's review of applications for writs of certiorari are most adequately met in this case.

I. The principle of national uniformity in the interpretation and enforcement of maritime law requires that the writ of certiorari herein requested be granted.

This case involves the question of relative rights and obligations of the shipper-owner of goods and a carrier of those goods by water. The Court of Appeals panel majority, one district court judge sitting by designation, affirmed the District Court on all issues while Judge Rosenn, dissenting, disagreed with the panel majority on all issues, with the exception of the issue of pre-judgment interest which was not raised in the dissent. Thus, two judges in active service on the Court of Appeals disagreed with respect to the major issues involved in this appeal.

While conceding that "this is a close case" and "case law provides no reliable chart", the panel majority nevertheless approved a major change in the law with respect to the rights and obligations of shippers and carriers regarding damages to goods. It misapprehended the existing case law and statutory law represented by the Harter Act, 46 U.S.C. §190 et seq. and the Carriage of Goods by Sea Act, 46 U.S.C. §1300 et seq., as well as other authorities in the field, with regard to the delicate balance that has been maintained between the competing interests of shippers and the safe carriage of cargoes, and the rights of carriers with respect to such carriage. The panel majority, in imposing a dual responsibility on a carrier to prove both that the damage to cargo was caused by a peril of the sea or obstruction to navigation, and prove its own freedom from negligence, imposed a responsibility on a carrier heretofore unknown in the law. In addition to its ruling with respect to the marine insurance issues in this case, and its affirmance of the denial of due consideration to the factual question of unseaworthiness of the barge involved in the loss of cargo, as noted below, the panel majority's treatment of the issue of the burden of proof, if allowed to remain the law of the Circuit without full consideration and review by this Court, will create a complete change in the method of trial of maritime cases involving cargo losses which will be

unique to the Circuit, and will violate the principle of national uniformity in the interpretation and enforcement of the maritime law in the United States.

This is a most important case with respect to the maritime industry. It deserves the review of this Court, particularly since two judges in active service on the Court of Appeals have taken diametrically opposite views on all pertinent issues. The opinion of the Court of Appeals creates a serious conflict among the Circuits and fails to utilize the proper standards set forth by this Court in the serious maritime issues raised herein.

II. The split decision of the panel of the Court of Appeals presents a serious and substantial conflict among the Circuit Courts of Appeal concerning the validity of marine insurance provisions under the rationale of Bisso v. Inland Waterways Corp., 349 U.S. 85, 75 S. Ct. 629 (1955).

There is now a clear conflict among the Circuits concerning the validity of insurance clauses similar to those contained in the Transportation Agreement and the Towing Contract, quoted in the Statement of the Case in this Petition. The Fifth Circuit in a series of cases, *Twenty Grand Offshore, Inc. v. West India Carriers, Inc.*, 492 F.2d 679 (5th Cir. 1974), *Cert. Den.* 419 U.S. 836, 95 S. Ct. 63 (1974) and *Fluor Western, Inc. v. G & H Offshore Towing Company*, 447 F.2d 35 (5th Cir. 1971), *Cert. Den.* 405 U.S. 922, 92 S.Ct. 959 (1972), and more recently, *BASF Wyandotte Corp. v. Tug Leander, Jr.,* *F2d* *(5th Cir. Feb. 16, 1979)*, has held that contracts requiring insurance with waiver of subrogation clauses affecting the interests of carrier and shipper are valid and enforceable and are not made unenforceable by *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 75 S. Ct. 629 (1955), or *Dixilyn Drilling Corp. v. Crescent Towing &*

Salvage Co., 372 U.S. 697, 83 S. Ct. 967 (1963). The panel majority in this case has held precisely to the contrary.

It is to be noted that these types of insurance provisions are printed in shipping documents regularly used by the shippers and carriers of cargoes on the inland waterways of the United States. This Court has previously denied certiorari on this issue when the Fifth Circuit opinions in *Twenty Grand Offshore, Inc.* and *Fluor Western, Inc.* were presented for review.

It is respectfully submitted that the time has come for this Court to again consider whether the insurance provisions in towing contracts and shipping documents of the types here involved are "exculpatory" in tenor or intent, the danger which the *Bisso* rationale was intended to defeat. As a noted commentator has indicated:

> "The *Bisso* dissent makes the further (and seemingly valid) point that in the normal case both interests [cargo and carrier] are insured, so that the question is really which shall carry insurance against this sort of loss. But in so far as valid, this point works both ways, for the tug with adequate P & I protection needs no exculpatory clause. In the case where insurance is not carried, or where it for any reason fails to cover adequately or at all, the choice must be made, as between the principals, which is to bear the loss. Indeed, the insurance factor may make exculpation especially inappropriate, since it is likely best that the controlling party be under threat of premium increase." *Gilmore & Black, The Law of Admiralty*, (2nd Ed. 1975) §7-15, page 519.

The insurance provisions here involved, as the previous quotation indicates, do make exculpation especially inappropriate, since the insurance provisions do not attempt to exculpate at all. As noted in the dissenting opinion in the Court of Appeals, here, unlike *Bisso*, the shipper did not

waiv. its right to recover its losses from any negligent party, nor did the contract itself provide for the waiver of any rights, nor was the contract adhesive.

Consistent with this Court's decisions in *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.*, 360 U.S. 411, 79 S.Ct. 1210 (1959), and *M/S Bremen v. Zapata Off-Shore Company*, 407 U.S. 1, 92 S.Ct. 1907 (1972), wherein this Court upheld a choice of forum clause in a towage contract (from Houston to Italy) which contained a stipulation for British law which specifically allows such exculpatory clauses as contained in *Bisso*, a definitive statement limiting the *Bisso* rationale to its precise facts is needed.

In any event, because of the clear conflict that exists among the Circuits, a final statement on the validity of these insurance provisions is required.

III. The panel majority of the Court of Appeals failed to utilize proper standards in determining

(a) the burden of proof with respect to cargo damage between carrier and shipper by requiring the carrier to prove both that cargo damage resulted from an excepted peril and that the carrier exercised due diligence to avoid the damage.

The panel majority states that the burden rests upon the carrier to show the cargo damage resulted from an excepted peril *and* the exercise of due diligence to avoid the damage caused by the described hazard. This statement reflects a serious misconception of the law dealing with burden of proof. As early as 1851, this court, in *Clark v. Barnwell*, 53 U.S. 272 (1851), recognized the burden on a carrier to show that a loss was caused by an excepted peril and that once that was established, the shipper was then required to show that the damage could have been avoided by the exercise of reasonable skill and attention by the carrier. While the panel

majority states that this rule was "modified" by *The Folmina*, 212 U.S. 354, 29 S.Ct. 363 (1909), that case did not involve proof by the carrier that the sea water found in the ship was occasioned by "an accident of the sea" as was established here by the general verdict of the jury, and thus *The Folmina* did not modify *Clark v. Barnwell*.

The burden of proof on the part of a carrier is not stated in the *conjunctive*, that the carrier must prove damage to cargo by a peril of the seal *and* its own freedom from negligence, but is stated in the disjunctive, that to free itself from liability, the carrier must establish cargo damage as a result of a peril of the sea or other excepted cause, *or* its own freedom from negligence. See *Gilmore & Black, The Law of Admiralty*, (2nd Ed. 1975) §3-43, pages 184-185.

The "tennis match" analogy drawn from Judge Rosenn in his dissent is apt. The panel majority, however, would rule that Canal's return shot, which proved that loss or damage was caused by the excepted peril, was out of bounds because it did not include proof of lack of negligence on its part as well. The extra shot required by the panel majority was itself a fault, requiring review by this Court.

The delicate balance drawn between the competing interests of the shippers and carriers as expressed in Opinions of this Court and Acts of Congress, such as the Harter Act and the Carriage of Goods by Sea Act, should not be tampered with without compeling reason. It is respectfully submitted that the panel majority of the Court of Appeals misapplied standards set by this Court and Congress with respect to that delicate balance in not requiring the shipper, PPG, to come forward with affirmative evidence of lack of due diligence on the part of the petitioner after petitioner had established to the jury's satisfaction, as evidenced by its general verdict, that an excepted peril, an obstruction to navigation, was the occasion for the damages. That has been the

rule since *Clark v. Barnwell;* it has not changed; and the issue as it affects the rights and liabilities of interests in the maritime industry is of sufficiently significant import to warrant review by this Court.

(b) The panel majority of the Court of Appeals utilized improper standards in determining that the trial court properly took the issue of unseaworthiness from the jury despite expert evidence on the record creating a factual issue of unseaworthiness.

Despite the clear expert evidence submitted by petitioner on the question of the seaworthiness of a barge transporting a water soluble cargo, the panel majority affirmed the District Court's taking from the jury the issue of seaworthiness of the barge. It is difficult to articulate the reason this was done. A jury was impaneled and hearing the case; evidence had been submitted factually indicating that the barge was not reasonably fit to carry the water soluble cargo she had undertaken to transport, that valuable water soluble cargo should be carried only in double skinned barges and that had the barge been a double skinned barge the cargo would not have become contaminated as the result of striking the submerged object.

Certiorari should be granted in this case because of the importance of the right to a jury determination which was denied here. A jury trial had been requested and the jury was the fact finder. Although the issue of seaworthiness is one maritime in character, the question of seaworthiness is normally one of fact and the fact finder should be permitted to make its determination. Clearly, here, fair-minded men viewing all the facts and inferences to be drawn from the facts, could differ over whether the ship and its gear were reasonably fit for the service requested of them: the transportation of a water soluble cargo. See *Greene v. Vantage Steamship Corp.*, 466 F.2d 159 (4th Cir. 1972); *Earles v.*

Union Barge Line Corp., 486 F.2d 1097 (3rd Cir. 1973); *Petition of Reliance Marine Transport & Contruction Corp.*, 206 F.2d 240 (2nd Cir. 1953); *The T.J. Hooper*, 60 F.2d 737 (2nd Cir. 1932), *Cert. Den. Sub. Nom. Eastern Transportation Co. v. Northern Barge Corp.*, 287 U.S. 662, 53 S.Ct. 220 (1932).

Thus, it is apparent with respect to the question of removing the issue of seaworthiness from the jury, that the panel majority misconceived both the applicable law and the standards which have been set forth concerning the concept of unseaworthiness.

CONCLUSION

It is not an over-statement to label the issues of this case as being of exceptional importance to the maritime bar. The insurance provisions in this case, which bear the Fifth Circuit's imprimatur, and which, by reason of the decision of the panel majority below, are valid in one Circuit and invalid in another, are a practical application of insurance law to the inland marine industry and should be held valid. Imposing the dual obligation on a carrier of proving both damages to cargo having resulted from an excepted cause and freedom from its own negligence is totally out of step with the historical development of the very sensitive rights and obligations between carrier and shipper and has little basis in case and statutory law and other authority. Finally, the panel majority has effectively rewritten over a century of maritime law in its holding that the District Court properly took the factual question of unseaworthiness from the jury, in the face of expert testimony as to the unseaworthiness of the barge involved.

Because of the significance of these issues to the maritime bar and maritime industry, because the split decision of

the panel of the Court of Appeals has created a substantial conflict among the Circuit Courts of Appeal concerning the validity of marine insurance provisions, because the principal of national uniformity in the interpretation and enforcement of maritime and admiralty law has been breached and proper standards set by this Court on burden of proof and unseaworthiness have been misapplied by the panel majority, petitioner respectfully petitions for the granting of a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 78-1027

PPG INDUSTRIES, INC., a Pennsylvania Corporation

v.

ASHLAND OIL COMPANY-THOMAS PETROLEUM TRANSIT DIVISION, a Kentucky Corporation

v.

CANAL BARGE COMPANY, INC. and INLAND RIVER TRANSPORTATION CORPORATION, a corporation, and DRAVO CORPORATION

Canal Barge Company, Inc.,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 72-932)

Argued September 28, 1978

Before: ROSENN and WEIS *Circuit Judges* and FISHER *District Judge.*•

Opinion Filed Dec. 29, 1978.

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•Honorable Clarkson S. Fisher, United States District Court for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

WEIS, *Circuit Judge*.

Damage to cargo transported by water has been a subject of litigation since the dawn of nautical history, yet the legal problems engendered by this activity continue to perplex the courts. In this case, the carrier contends that once it established lack of responsibility for damage done to a barge's hull as it struck a submerged object, the burden of proving negligence causing cargo damage shifted to the plaintiff shipper. The trial judge, however, charged the jury that the burden remained with the carrier to show due diligence in caring for the cargo after the incident. The district court also held that a clause in the towing contract requiring the shipper to secure insurance on the cargo with a waiver of subrogation against the carrier was exculpatory and unenforceable. And finally, since double-skinned barges were not in general use on the rivers, the trial judge ruled that a single-skinned barge used for carrying a water soluble cargo was not unseaworthy per se and withdrew that issue from the jury. Finding no reversible error in the district court's rulings, we affirm.

On March 2, 1971, Ashland agreed to transport a cargo of antifreeze owned by PPG Industries, Inc. from Beaumont, Texas to St. Paul, Minnesota. Canal Barge Company later entered into a separate towing contract with Ashland, agreeing to tow the barges containing antifreeze from Baton Rouge, Louisiana to St. Paul. Upon delivery in St. Paul, the antifreeze in one of Ashland's barges was found to be contaminated by river water.

PPG brought suit against both Ashland and Canal. In early stages of the litigation, it was determined that because of the incorporation of the Carriage of Goods by Sea Act

(COGSA), 46 U.S.C. §§1300-1315, in the PPG-Ashland contract, the limitation period had run before suit was commenced. Judgment was accordingly entered in Ashland's favor against PPG. The claim for cargo loss asserted against Canal, however, continued to be viable as were the cross-claims between Ashland and Canal. *PPG Industries, Inc. v. Ashland Oil Co.-Thomas Petroleum Transit Division*, 527 F.2d 502, 505-07 (3d Cir. 1975).

On remand, the case proceeded to trial in the district court[1] before a jury which found a general verdict in favor of Canal, but by special interrogatories determined that Canal was negligent and that the cargo loss was $110,000. Ashland's claim for damages to its barge was denied. The district court entered judgment n.o.v. in favor of PPG for the cargo loss and added interest.

The evidence established that about four days before arrival at St. Paul an accident occurred near Lock 14 on the Mississippi River and the Ashland barge was damaged. While maneuvering before entering the lock, the barges and towboat unexpectedly turned around in the river, a movement called "topping." As they did so, at least one barge scraped the river bottom or hit some submerged object. Inspection of the Ashland barge hull after it reached St. Paul and had been taken to dry dock revealed three holes more than one inch wide and a number of cracks varying in size from a fracture line to one-quarter inch in width. None of this damage could be seen while the barge was in the water.

Members of the crew testified that after the topping incident and during the remaining days of the voyage rou-

[1]Diversity jurisdiction was invoked. Because of concurrent jurisdiction of the common law and admiralty under the Constitution, Art. III, §2, and under act of Congress, 28 U.S.C. §1331(1), this in personam action was properly brought in the district court and a jury trial was in order. *See* 1 BENEDICT ON ADMIRALTY §§106-107, 121-127 (7th ed. 1974); G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 19-31 (2d ed. 1975).

tine external checks did not disclose any signs that the Ashland barge was taking on water. No steps were taken, however, to examine the cargo or have the hull thoroughly inspected. At St. Paul, it was discovered that water had entered some of the barge compartments and contaminated the antifreeze, a highly soluble substance.

The trial judge removed from the jury's consideration Canal's contention that the barge was unseaworthy because a double-skinned vessel should have been used to carry cargo of this nature. The district court also decided that a provision in the PPG contract with Ashland requiring that the cargo owner purchase insurance for its own account with waiver of subrogation to the carrier did not relieve Canal of liability for the loss.

The case was submitted to the jury on instructions that upon proof the cargo was in good condition at the voyage's beginning, and was delivered at its end in damaged condition, a prima facie case for PPG was established. The jury was further charged that the burden shifted to Canal to establish due diligence and care for the cargo, but if it were shown that the loss was caused by a peril of the sea, then PPG would not be entitled to recover. The jury was told to submit a general verdict.

During their deliberations, the jurors sent a note to the trial judge reading:

> "If in our deliberations we consider that the damage to the barge took place during the topping at Lock 14 and that no negligence existed on the part of the captain and pilot of the Caroline [Canal tug], must we at that point stop any further deliberation, or can we consider what is believed to be negligence on the part of the parties involved following the topping?"

After consultation with counsel, the trial judge instructed the jurors in substance that if they found Canal was

not at fault for the topping, they should stop at that point. However, in addition, the judge asked that certain interrogatories be answered. In general they asked, assuming Canal had shown due diligence up to and including the topping incident, what part of the cargo damage took place as a result of the topping; what portion occurred from the failure of due care thereafter; which parties failed to exercise due care; and what was the amount of damage.[2]

The jury returned a general verdict in favor of Canal, but in answer to the interrogatories, found that Canal failed to exercise due care after the topping. According to the jury's responses, none of the cargo damage resulted from the topping, but rather flowed from failure to exercise due care thereafter. After consideration of post-trial motions, the district court entered judgment n.o.v. in the amount of $110,000 against Canal.

I.

BURDEN OF PROOF

Canal contends that in submitting the interrogatories to the jury, the trial judge erred in allocating the burden of

[2]The interrogatories and answers were as follows:

"1. If you determine that Canal has satisfied its burden of showing due diligence up to and including the topping incident at Lock 14, what percentage of the damage to the cargo occurred as a result of the topping, if any, and what percentage occurred from a failure of due care from the time of the topping to the arrival of the REB-1602 [Ashland barge] in St. Paul?

Topping	0%
After Topping	100%

"2. Which of the parties, if any, failed to exercise due care from the time of the topping incident to the time of arrival in St. Paul?

Defendant Canal
Plaintiff, Defendant,
Third-Party Defendant

"3. What was the total amount of damage to the cargo?

$110,000[00]"

proof. Canal's position is that if it met the burden of proving a peril of the sea, then PPG was required to prove that negligence of the carrier caused the cargo damage. The judge did not accept this argument. In connection with the interrogatories, he delivered these instructions:

> "So what I am asking you to do is that, if you are satisfied that Canal met its burden by a fair preponderance of the evidence that it exercised due care and diligence up to the time of the topping, and if you are satisfied that Canal has met its burden of showing by that standard that the topping itself was not due to the lack of due care or diligence, but to the peril of the sea, if you will, or whatever, then you decide that Canal didn't establish to your satisfaction that it exercised due care and diligence during the rest of the trip,—I think there were four days beyond the topping incident, and if you decide they didn't establish that to your satisfaction; then I want to know what percentage of the damage to—the contamination to the cargo occurred as a result of the topping itself and what percentage occurred as a result of the failure to exercise diligence and due care after the topping."

The towing contract required Canal to exercise due diligence in the handling, care and delivery of the cargo but reserved for the carrier the limitation of liability granted under §3 of the Harter Act, 46 U.S.C. §192.[3] Section 3 would

[3]Paragraph 13 of the Canal-Ashland towing contract states:

"13. The cargo shall be transported at the sole risk of such cargo, insofar as losses of or damage to such cargo is concerned, and neither Company A [Canal] nor any person employed by Company A, nor any vessel, barge or other equipment used hereunder, shall be liable for any loss of or damage to such cargo regardless of the causes of such loss or damage, provided only that Company A shall have exercised due diligence to make such vessel and other equipment seaworthy and properly manned, equipped and supplied, and provided that reasonable care shall have been exercised in the receipt, stowage, *(continued)*

relieve Canal from liability if the loss was caused by a peril of the sea.[4]

The jury verdict established that the damage to the barge was caused by the topping incident. Cargo loss, however, was another matter. The jury apparently believed that the damage to the hull was not so extensive as to be the sole and proximate cause of the contamination and that the subsequent neglect of the carrier was the immediate cause. In granting judgment n.o.v. to the cargo owner, the trial judge necessarily implied that there was adequate evidence to support the jury's conclusion.

Where damage to the cargo is not discovered until after it has been delivered and no substantial evidence of the cause remains, allocation of the burden of proof and attendant risk of nonpersuasion in proving that the loss arose from a cause excepted under law or by the parties is often crucial in determining liability. Our task here is to determine

handling, care and delivery of the cargo which shall be in the possession of the tow from the time that the products reached the barge pipe or hose connection in loading until the products reached the shore line or hose connection in unloading. Company A although not a common carrier, shall be entitled to the same limitation of liability as common carriers receive under Section 3 of the Harbor [sic] Act (46 U.S.C.A. §192). Nothing in this contract shall be construed to. . . limit Company A's right to any statutory protection or limitation of liability, which would otherwise be applicable."

Private carriers are not generally subject to the Harter Act unless specifically provided by agreement of the parties. *See generally* A. KNAUTH, THE AMERICAN LAW OF OCEAN BILLS OF LADING 176-77 (4th ed. 1953).

[4]Section 3 of the Harter Act provides in part pertinent here:

"[N]either the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel. . . be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package. . . ."

whether the judge's charge properly directed the jury on this issue. Since the exculpatory provisions of the Harter Act were incorporated into the towing contract by reference, the decisional law regarding burden of proof under that Act and COGSA,[5] is pertinent to our review.

A seminal case in the United States, a pre-Harter Act decision,[6] is *Clark v. Barnwell*, 53 U.S. 272 (1851), in which there was a claim for damaged goods shipped under a bill of lading that excepted liability for "all, and every the dangers and accidents of the seas and navigation . . . ." *Id.* at 280. The Court explained that upon a showing that there had been delivery of goods in damaged condition, the burden was on the carrier to show that the loss was caused by an excepted peril. Once that was established, the shipper was required to prove that the damage could have been avoided by the exercise of reasonable skill and attention by the carrier. "But in this stage and posture of the case, the burden is upon the plaintiff to establish the negligence as the affirmative lies upon him." *Id.* The Court then quoted from the charge of Lord Chief Justice Denman in *Muddle v. Stride*, 9 Car. & Payne 380:

> "[I]f on the whole, it be left in doubt what the cause of injury was, or, if it may as well be attributable to 'perils of the sea' as to negligence, the plaintiff cannot recover."

This latter reference must be considered to have been modified by *The Folmina*, 212 U.S. 354 (1909). In that case

[5]Essentially, the Harter Act and COGSA govern the rights and liabilities of carrier and cargo owner when goods transported under a bill of lading are damaged or lost. With certain exceptions, *see, e.g.*, GILMORE & BLACK, *supra* at 145-85, 153 n.50, the Harter Act and COGSA pose similar problems in burden of proof cases so that it is common practice to cite cases governed by the two interchangeably. *See also* Knauth, *supra* at 163-69.

[6]The common law rule on burden of proof was carried forward under the Harter Act. GILMORE & BLACK, *supra* at 141 n.8, 183.

cargo was damaged by sea water, and the Court said, "while there was a certainty from the proof of a damage by sea water, there was a failure of the proof to determine whether the presence of the sea water in the ship was occasioned by an accident of the sea, by negligence, or by any other cause." *Id.* at 363. The Court held that the carrier had failed to meet its burden and accordingly, was liable. *See also Commercial Corp. v. New York Tank Barge Corp.*, 314 U.S. 104, 108-09 (1941). Moreover, as the court explained in *Lekas & Drivas, Inc. v. Goulandris*, 306 F.2d 426, 431 (2d Cir. 1962): "The respondents in *Clark v. Barnwell* had not only established a peril of the sea as a cause but had negated all others."

Since the carrier, and not the shipper, usually has the means of knowing most about the events of the voyage, it is sound to place on the ship owner both the burden of showing the inclusion of loss within an exception and proving the exercise of due diligence to prevent harm to the cargo. Application of the general rule at times appears inconsistent because of the varying factual circumstances leading to cargo loss and the diverse exemptions sought to be invoked. Two patterns discernible from case law and pertinent to our analysis here surface:

The first is where the cargo is damaged by forces completely unrelated to its inherent nature. For example, a cargo of steel is lost because the ship sinks. In this situation, inquiry focuses upon the cause of injury to the vessel, not the cargo. The damage claim, therefore, centers on cause and to avoid responsibility the carrier must prove that the damage to the cargo stemmed from an exempted occurrence, such as a danger of the sea. The burden rests upon the carrier to show that the cargo damage resulted from the excepted peril, and the exercise of due diligence to avoid the damage caused by the described hazard. *E.g.*, *States Marine Corp. v. Producers Cooperative Packing Co.*, 310 F.2d 206 (9th Cir. 1962); *Tri-*

Valley Packing Ass'n v. States Marine Corp., 310 F.2d 891 (9th Cir. 1962); *Schroeder Bros. v. The Saturnia*, 226 F.2d 147 (2d Cir. 1955).

Second is that where the nature of the injury to the cargo indicates in and of itself inclusion within a specified exemption from liability provided by the Act or bill of lading, such as decay or rust. For example, if steel cargo is delivered in rusty condition and the bill of lading exempts the carrier from liability for rust, the burden is on the cargo owner to establish negligence as a cause once the carrier shows that the nature of the damage brings it within the exception. In order to recover, the cargo owner must carry the burden of proving the carrier's negligence brought about the damage. If the cause of injury is left in doubt, the carrier stands excused since by virtue of the exemption the shipper accepted the risk of loss of that kind. There is nothing additional the carrier need prove to place the loss within the clause which exempted liability—the nature of the injury speaks for itself. *See, e.g., The Monte Iciar*, 167 F.2d 334 (3d Cir. 1948). As the Supreme Court said in *The Folmina*, *supra* at 362:

> "Of course, where goods are delivered in a damaged condition, plainly caused by breakage, rust or decay, their condition brings them within an exception exempting from that character of loss, as the very fact of the nature of the injury shows the damage to be *prima facie* within the exception, and hence the burden is upon the shipper to establish that the goods are removed from its operation because of the negligence of the carrier."

See generally The Patria, 132 F. 971 (2d Cir. 1904); A. KNAUTH, THE AMERICAN LAW OF OCEAN BILLS OF LADING 193-96 (4th ed. 1953); Comment, *Cargo Damage at Sea: The Ship's Liability*, 27 TEX. L. REV. 525 (1947).

The case *sub judice* falls into the first category. Canal's defense is that the damage was caused by a defect in navigation or peril of the sea exception under the Harter Act. We look therefore to cause, not result, and the carrier must meet its burden of persuasion that the cause of the damage fell within the exception.

The way in which the issue is posed often determines the outcome of the case. Here, the issue could be framed as whether the failure to mitigate damages to the cargo was a separate act of negligence which the plaintiff was required to prove; or, alternatively, whether the carrier fully discharged its obligation to meet the plaintiff's prima facie case by showing that a peril of the sea caused some hull damage during the voyage.

Case law provides no reliable chart. In G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 170 (2d ed. 1975), the authors characterize the failure to use due care in preventing the spread of mischief as negligence. Moreover, they reject the proposition that the meter happening of damage through an excepted peril releases the carrier from responsibility to take due measures for proper cargo care thereafter.

The jury's findings established that the carrier met the plaintiff's prima facie case up to and including the topping incident, and the defendant would have been exonerated if the matter had ended at that point. It did not, however, since the jury found that thereafter the carrier failed to exercise due diligence and cargo damage resulted. This is a close case, but in our view the trial judge did not err in imposing the burden on the carrier to demonstrate its exercise of due care in caring for the cargo to the end of the voyage. Immunity conferred by the Harter Act must be strictly construed. GILMORE & BLACK, *supra* at 156 n.50. The prima facie case of negligence which the cargo owner made out by showing damage to the cargo at destination was not com-

pletely answered by the defendant's evidence of the topping incident and its conduct for the remainder of the voyage.

Moreover, the basic policy underlying the shifting of burden to the carrier to explain damage, *see Schnell v. The Vallescura*, 293 U.S. 296, 307 (1934), supports imposition of the burden on Canal. The carrier knew what happened after the topping incident to the end of the voyage and was in a far better position than the shipper to present evidence of due care.

This case differs from those in which the burden shifts back to the shipper to prove that antecedent or concurrent negligence on the part of the carrier contributed in bringing about the loss. In those instances, after the carrier produces evidence of the excepted cause which brought about the damage, the shipper may go forward and show that other factors for which the ship was responsible played a part. But when the carrier's evidence does not show that the excepted cause produced all of the damage, as here, the shipper is entitled to a complete explanation. In *Armco International Corp. v. Rederi A/B Disa*, 51 F.2d 5, 8 (2d Cir. 1945), the court, concerned with the problem of determining whether damage occurred aboard ship or ashore, said:

> "So far as there is any uncertainty as to the extent of the damage which happened while the [cargo was] on board, the ship has the burden of proof . . . . She did not, and indeed could not, prove what part was done aboard and what ashore."

Similarly, here the burden was on the carrier to prove the damage caused by the excepted hazard. "It is sufficient, if the carrier fails to show that the damage is from an excepted cause, to cast on him the further burden of showing that the damage is not due to failure properly to stow or care for the cargo during the voyage." *Schnell v. The Vallescura*, *supra* at 305. In *Schnell*, because the claim was for an

excepted result, the shipper initially did produce evidence of negligence in order to sustain its burden. The court there held that the carrier was liable for all the damage in view of its inability to apportion the loss between an exception and its negligence.[7]

In the case at bar, having made out a prima facie case of negligence, the plaintiff stood in as good a position as the shipper in *Schnell*. The burden shifted to the defendant to prove whether all or an ascertainable part of the damage was the result of an excepted clause. This allocation of respective burdens is supported by sound public policy and is consistent with the general rule permitting a cargo owner to use a prima facie case to show lack of care in delivery of the goods. We find no error in the court's charge in this respect.

II.

THE INSURANCE CLAUSE

In the transportation agreement between PPG and Ashland, the parties agreed that

> "Hull and P & I insurance will be carried with a first class underwriter by Carrier [Ashland] for Carrier's account. Cargo insurance will be assumed or carried by Shipper [PPG] for his own account, with waiver of subrogation to the Carrier."

In the contract between Ashland and Canal, there was no mention of cargo insurance but only a proviso that Asland was to carry Hull and P & I insurance. PPG did not take out

[7] Schnell v. The Vallescura, *supra*, has often been cited in both "result" and "cause" kinds of cases for the proposition that there is a shifting burden of proof. *See, e.g.*, cases listed in Vana Trading Co. v. S.S. Mette Skou, 556 F.2d 100, 104 n.7 (2d Cir. 1977). Indeed, although the *Schnell* opinion contains language applicable to both situations, it is itself a "result" case. Consequently there the shipper initially supplied direct evidence of negligence, rather than relying on a prima facie case.

cargo insurance and Canal contends that it is therefore relieved of liability. The district court ruled that even assuming arguendo that the plaintiff was contractually bound to maintain coverage, that provision was unenforceable as a matter of public policy, citing *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955), and *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963).

Requiring the cargo owner to insure the goods and providing there shall be no subrogation is an effective way of insulating the carrier from liability regardless of culpability. The cargo owner can be expected to make a claim against his insurance company in anticipation of reasonably prompt payment rather than proceeding to contest the matter with the carrier. If the insurance company pays the claim, it cannot sue the carrier and, thus, the matter is at an end. As the district court acknowledged, however, such an arrangement runs afoul of *Bisso* and *Dixilyn Drilling* which bar contract provisions that shift responsibility for tower's negligence. *See also Boston Metals Co. v. The Winding Gulf*, 349 U.S. 122 (1955).

We are unpersuaded by cases tending to place a different focus on this issue. Although the Court of Appeals for the Fifth Circuit has treated the problem as essentially one of bargaining over which party shall pay the insurance premium, *see Twenty Grand OffShore, Inc. v. West India Carriers, Inc.*, 492 F.2d 679 (5th Cir.), *cert. denied*, 419 U.S. 836 (1974), and *Fluor Western Inc., v. G & H Offshore Towing Co.*, 447 F.2d 35 (5th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972); *cf. Dow Chemical Co. v. Ashland Oil, Inc.*, 579 F.2d 902 (5th Cir. 1978), we are inclined to view *Dixilyn Drilling*, *supra*, as proscribing indirect as well as direct exculpation of negligence by carriers. *See Dow Chemical Co. v. M/V Charles F. Detmar, Jr.*, 545 F.2d 1091 (7th Cir. 1976). Moreover, even if the Fifth Circuit approach were used here, it would not help Canal because it never bargained with PPG about cargo insurance, and therefore, cannot show reduction of its charges on that basis. Compare *Twenty Grand Offshore Inc., v. West India Carriers, Inc., supra* at 681-83.

We are also not convinced that the insurance clause in the transportation agreement extended to anyone other than Ashland. In the first appeal in this case, we found that COGSA provisions were not intended to apply to Canal and that contract references to "persons employed by carrier" extended only to individual employees of Ashland, not Canal. 527 F.2d at 506. The rationale of that opinion requires adoption of the same approach in construing the insurance clause of the transportation contract. Accordingly, we conclude that Canal is not entitled to judgment because of PPG's failure to secure cargo insurance.

III.

SEAWORTHINESS

Canal produced an expert who opined that the antifreeze should have been carried in a double-skinned barge and that for this cargo the single-skinned vessel used was unsuitable, and consequently, unseaworthy. The expert said that to his knowledge double-skinned barges had first been built about six years before the topping incident and were used to transport lubrication oil.

The marine superintendent for Canal testified that although it had some double-skinned barges in 1971, most of its equipment was of the single-skinned variety. He said that the Coast Guard had not issued any pertinent regulations, and at the time of the incident, custom was beginning to change in favor of using double-skinned vessels. When double-skinned barges were not available, Canal would use single skin vessels to carry soluable cargo. The witness also

stated that Canal would never furnish an unseaworthy vessel.

During the trial, the district judge ruled,

"there is nothing unseaworthy about a single skin barge so long as the single skin holds and in view of the testimony that at the time this was going on, most barges were single skinned.

Then there was another question of whether it could be a single skin on the bottom and double skin on the side. I'm not prepared to rule that a single skin barge was ipso facto unseaworthy, and I have so ruled."

Although the jury was directed to consider unseaworthiness in other aspects, the issue of whether a single-skinned barge was seaworthy was not submitted to it.

Seaworthiness is a relative term which looks to such matters as the type of vessel, character of the voyage, reasonably expectable weather, and navigational conditions. *May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft*, 290 U.S. 333, 346-49 (1933) (*The Isis*); *J. Gerber & Co. v. S.S. Sabine Howaldt*, 437 F.2d 580, 596 (2d Cir. 1971); *Horn v. Cia de Navegacion Fruco, S.A.*, 404 F.2d 422, 431 (5th Cir. 1968), *cert. denied*, 394 U.S. 943 (1969). The vessel must be reasonably fit to carry the cargo she has undertaken to transport. *The Silvia*, 171 U.S. 462 (1898).

Generally, the issue of unseaworthiness is one of fact and is submitted to the jury. *Luckenbach v. McCahan Sugar Co.*, 248 U.S. 139, 145 (1942). *The Wildcroft*, 201 U.S. 378, 387 (1906); *The Carib Prince*, 170 U.S. 655, 658 (1898). Here, however, there was no dispute about the facts. Essentially, what the defendant was asserting was a new development in construction which had not come into common use in the industry. It was not such an innovation it had to be adopted by all shippers immediately, making the older barges obsolete for transporting this particular cargo. *Compare The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir.), *cert. denied sub nom. Eastern Transportation Co. v. Northern Barge Corp.*, 287 U.S. 662 (1932), *with Marshall v. Ove Skou Rederi A/S*, 378 F.2d 193, 201 (5th Cir.), *cert. denied*, 389 U.S. 828 (1967). Nor was it shown that scraping the barge and holing the bottom was reasonably to be expected in a voyage on the Mississippi. Under the circumstance of this case, the trial judge did not err in withdrawing the design issue from the jury.

The defendant also contends that it was error to award interest to the plaintiff. This was a matter within the discretion of the trial court and we find no abuse in its exercise.

Having carefully reviewed the case, we conclude that the district court did not commit reversible error, and accordingly the judgment will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

.....

Circuit Judge

RE: PPG INDUSTRIES, INC., a Pennsylvania Corporation v. ASHLAND OIL COMPANY-THOMAS PETROLEUM TRANSIT DIVISION, a Kentucky Corporation v. CANAL BARGE COMPANY, INC. and INLAND RIVER TRANSPORTATION CORPORATION, a corporation, and DRAVO CORPORATION. Canal Barge Company, Inc., Appellant No. 78-1027

ROSENN, *Circuit Judge*, Dissenting

This appeal involves the application of maritime legal principles to transportation of cargo on the Mississippi River. The focal point of the complex controversy between the shipper of the cargo, PPG Industries, Inc. ("PPG"), and the several carriers is the topping incident at Lock 14 which caused the penetration of the antifreeze-laden hull of the barge REB-1602. Because I cannot agree with the majority's rationales on the burden of proof, the enforceability of the insurance provisions, and the seaworthiness issues, I respectfully dissent.

In March of 1971, Ashland Oil Company-Thomas Petroleum Division ("Ashland") contracted to transport approximately 400,000 gallons of antifreeze, a soluble liquid, for PPG from its plant in Beaumont, Texas to St. Paul, Minnesota. The antifreeze was loaded into Ashland's barge REB-1602 and towed to Baton Rouge, Louisiana. Ashland then entered into a separate agreement with Canal Barge Company, Inc. ("Canal") obligating Canal to tow the REB-1602 to St. Paul.

During the voyage on the river, a topping incident occurred at Lock 14. The single skin barge scraped either the river bed or a submerged object causing damage to the hull of the craft. It is undisputed that during the remaining four days of the trip, the antifreeze cargo became contaminated with river water. By the time the barge had arrived in St. Paul, 131,474 gallons of antifreeze had become unsalvageable.

I. Burden of Proof

A.

The trial court in effect instructed the jury that Canal had the burden of proving that it acted with due diligence from the inception of its tow of the barge until the ultimate delivery of the cargo at St. Paul. Both parties and the majority agree that the general verdict shows that Canal met its burden up to the time of the topping incident by demonstrating that the damage to the barge was caused by a peril of the sea or obstruction to navigation for which there is no liability. However, the court also charged the jury that even *after* the topping incident Canal had the burden of proving that it exercised due diligence in transporting the cargo during the balance of the voyage. Whether this instruction was proper is significant to the outcome of this case.

The theory of liability apparently asserted by PPG was that Canal negligently failed to inspect the barge and salvage the cargo after the topping incident. (No evidence was presented to suggest that a separate, subsequent occurrence resulted in damage to the cargo.) With Canal carrying the burden of proof imposed upon it by the court, it had to establish the standard of care of a carrier in such a situation and the necessary steps it had taken to satisfy that standard. If the jury was unconvinced by Canal, then PPG would have to prove nothing in order to recover. If, however, PPG had the burden of proof, it would have to produce evidence as to what actions Canal should have taken after the topping incident in the exercise of reasonable care. PPG failed to produce evidence on this point. Thus, if the burden of proof after the topping incident shifted to PPG on this question, the judgment in its favor cannot stand.

The majority's initial formulation of the burden of proof issue is correct: once the cargo owner proves that the cargo was in good condition when loaded but contaminated when delivered, a prima facie case of liability has been made against the carrier. Where the majority and I change course, however, is after the barge was exposed to the peril of the sea. According to the majority, "[t]he burden rests upon the carrier to show that the cargo damage resulted from the excepted peril, *and* the exercise of due diligence to avoid the damage caused by the described hazard." Maj. op., *supra* at 9 (emphasis supplied). I believe the case law does not go so far. On the contrary, it merely holds that the carrier must establish *either* an excepted cause *or* due diligence, but not both.[1]

[1]The majority opinion analyzes a dichotomy in the case law between "cause" and "result" cases, suggesting that while in a "result" case the burden of proof on the negligence issue may shift to the cargo owner, in a "cause" case it clearly remains with the carrier. Maj. op., *supra* at 9-12. I believe this is a misunderstanding of the distinction between the two types of cases.

In both kinds of cases, the shipper establishes a prima facie case of liability by showing that the cargo was delivered to the carrier in good condition, but outturned at the destination damaged. The significance of the distinction between "result" and "cause" relates to what the carrier must prove before the burden shifts to the cargo owner to prove negligence. The question is answered by examining the exemptions from liability available to the carrier. These can be either statutory or incorporated by contract in the bill of lading.

The bill of lading sometimes includes exemptions from liability for certain damaged conditions of the cargo, such as rust, breakage, or decay. This type of provision is advantageous to the carrier because if goods are outturned in damaged condition and it can show that it is an excepted condition, then the carrier has satisfied its burden and will not be liable absent proof of negligence. In the "result" case, the carrier need not prove the cause of the defective condition.

Where the contract does not provide for an exemption from liability for goods delivered in certain damaged conditions, the carrier may still be relieved from liability by proving that the damage resulted from an

(continued)

The Supreme Court in *Schnell v. The Vallescura*, 293 U.S. 296 (1934), adopted the alternative approach. "It is sufficient, *if the carrier fails to show that the damage is from an excepted cause*, to cast on him the further burden of showing that the damage is not due to failure properly to stow or care for the cargo during the voyage." *Id.* at 305 (emphasis supplied). Similarly, in *Lekas & Drivas, Inc. v. Goulandris*, 306 F.2d 426 (2d Cir. 1962), Judge Friendly said that once the shipper establishes a prima facie case, "the burden then falls upon the carrier to bring itself within an excepted cause *or* to prove it exercised due diligence to avoid and prevent the harm." *Id.* at 429 (emphasis added). *See Horn v. CIA de Navegacion Fruco, S.A.*, 404 F.2d 422, 435 (5th Cir. 1968), *cert. denied*, 394 U.S. 943 (1969).

The statutory scheme of the Carriage of Goods By Sea Act, 46 U.S.C. §§1300-1315 (1970) (COGSA), supports this position.[2] Section 4(2) of COGSA, 46 U.S.C. §1304 (2), estab-

excepted cause. The excepted causes may be available by contract or the relevant statutes. The difference between these cases and the "result" cases is that here it is necessary to prove the cause of the defective condition before the burden of proof on the negligence issue will shift to the cargo owner.

If the carrier *fails* to prove either an excepted cause or result, it can still be excused from liability if it carries the burden of proving the exercise of due diligence. In neither the "cause" nor "result" cases can the carrier exempt himself from liability for negligence. But once the carrier has proven either an excepted cause or an excepted result (depending on which exemptions are available), the burden will be on the cargo owner to prove the carrier's negligence. The significance of the difference in the two kinds of cases relates only to the nature of the exception claimed, and, thus, what the carrier must show in order to shift the burden. Determining whether an action is a "result" or "cause" case does not, as the majority suggests, dispose of the question of which party has the burden of proving negligence. *See* 27 Tex. L. Rev. 525 (1949).

[2]I agree with the majority that although COGSA is not controlling in this case, the statute and the decisional law under it are applicable by analogy. *See* Maj. op., *supra* at 7 n.5.

lishes sixteen specific causes of damage to cargo for which a carrier by sea would not be liable. A seventeenth provision is included which excuses the carrier from liability for any other cause which was not the result of the carrier's negligence. The statutory scheme intended by Congress was to permit the carrier to prove either one of the sixteen excepted causes or the absence of negligence regardless of the cause. *See* G. Gilmore & C. Black, The Law of Admiralty 183-85 (2d ed. 1975).

I find the authorities cited by the majority in support of its position that the carrier must prove both an excepted cause and absence of negligence, (*Producers Cooperative; Tri-Valley Packing;* and *The Saturnia*) Maj. op., *supra* at 9, unpersuasive. Only one of the three, *Tri-Valley Packing*, actually endorses the dual requirement. *States Marine Corp. v. Producers Cooperative Packing Co.*, 310 F.2d 206 (9th Cir. 1962), quoting from *Schnell v. The Vallescura*, *supra*, applies the rule in the alternative and not the conjunctive, as do the majority, and states that the carrier must "'bring himself within the exception *or* to show that he has not been negligent.'" 310 F.2d at 212 (emphasis added). In *Schroeder Bros. v. The Staurnia*, 226 F.2d 147 (2d Cir. 1955), the question was never considered because the carrier failed to prove either an excepted cause or the exercise of due diligence.

The court in *Tri-Valley Packing Association v. States Marine Corp.*, 310 F.2d 891 (9th Cir. 1962), does take the position that even though the carrier proved that damage to the cargo came from an excepted cause, the burden of proof remained on the carrier to prove that it was free from negligence. The entire discussion of this issue in the opinion merely consists of this curt statement:

> Appellees also contend that the burden of showing carrier negligence was on libelants. This is simply not the law. Cf. States Marine Corp. v. Producers Cooperative Co., 9 Cir., 310 F.2d 206, and see Gillmore and Black, The Law of Admiralty: "The Burden of Proof" pp. 162-163.

Id. at 893 (omitted footnote quotes paragraph from Gilmore & Black).

I have already pointed out that *Producers Cooperative* does not support this position. Diss. op., *supra* at 5. Furthermore, Gilmore and Black view the requirement of proof of due diligence as an alternative to proof of an excepted cause. "Once the damage is established, the carrier, it would seem, has two main lines of possible escape." One is proof of an excepted cause and the other is proof of freedom from fault. Gilmore & Black (2d ed.) *supra* at 184-85.

Thus, once the shipper has shown that good cargo arrived in damaged condition, the carrier can rebut this prima facie case of liability by proving an excepted cause. This, however, does not necessarily relieve the carrier from liability. Proof of negligence will render a carrier liable despite a showing of an excepted peril. I do not propose that "the mere happening of damage through an excepted peril releases the carrier from responsibility to take due measures for proper cargo care thereafter". Maj. op., *supra* at 11. Failure to handle cargo properly after an accident or failure to mitigate damages constitutes negligence. The burden of proving this issue, however, does not belong to the carrier and I, therefore, disagree with the majority's determination that it does.

For over a century, cases have uniformly held that once a shipper's prima facie case is rebutted by proof of an excepted cause, the burden of proving that the exercise of due care could have avoided or reduced the damage returns to the cargo owner. In 1851, the Supreme Court announced the principle that has since prevailed.

> Hence it is, that, although the loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. But in this stage and posture of the case, the burden is upon the plaintiff to establish the negligence as the affirmative lies upon him.

Clark v. Barnwell, 53 U.S. 272, 280 (1851); *accord, Schnell v. The Vallescura*, *supra* 293 U.S. at 304-05; *The Monte Iciar*, 167 F.2d 334, 337 (3d Cir. 1948) (en banc); *United States v. Los Angeles Soap*, 83 F.2d 875, 881 (9th Cir. 1936).

This allocation of the burden of proof was also intended by the framers of COGSA: "Once a COGSA exception is established, the burden then returns to the shipper or consignee to 'show that there were. . . concurrent causes of loss in the fault and neglect of the carrier.'" *Vana Trading Co. v. SS "Mette Skou"*, 556 F.2d 100, 105 (2d Cir.), *cert. denied*, 434 U.S. 892 (1977); *accord, Lekas & Drivas, Inc. v. Goulandris*, *supra* 306 F.2d at 432; Gilmore & Black, *supra* at 184.

The century-old principle is consistent with the general rule for common carriers of goods:

> It is generally agreed, however, that a carrier of goods, who is an insurer against everything but a few exceptional perils, has the burden of proving that the loss or damage to the goods falls within one of the exceptions, after which it is the prevailing view that the burden is upon the plaintiff to show any negligence of the carrier responsible for the harm under such circumstances.

W. Prosser, Law of Torts 209 (4th ed. 1971) (footnotes omitted).

The majority's assertion, *see* maj. op., *supra* at 11-12, that the carrier must prove that *all* of the damage to the cargo was the result of an excepted peril before the burden on the

negligence question will shift to the cargo owner is not the prevailing law. In a case such as this, where the shipper alleges that negligence took place after the vessel was damaged by an excepted cause, proof that all of the damage to the cargo was the result of the peril of the sea would exempt the carrier from liability and end the case. Subsequent negligence would be irrelevant because it could not have caused any damage to the cargo. Thus, the shifting burden would only be relevant in a case where the carrier succeeded in proving that at least part of the damage was the result of an excepted cause. The shipper could then prove that part of the damage was also attributable to negligence. *See United States v. Los Angeles Soap*, *supra* 83 F.2d at 882.

If the shipper proves that despite the excepted cause the carrier's negligence contributed to the damage to the cargo, then the burden of proof reverts to the carrier to apportion damages between the excepted cause and the negligence. Failure to prove the proper allocation will leave the carrier liable for the full extent of the damages. *Schnell v. The Vallescura*, *supra* 212 U.S. at 306. The case only reaches this point, however, after the shipper carries its burden of proving the carrier's negligence. *See id.*; *Vana Trading Co. v. SS "Mette Skou"*, *supra* 556 F.2d at 106; *Armco International Corp. v. Rederi A/B Disa*, 151 F.2d 5 (2d Cir. 1945); *United States v. Los Angeles Soap*, *supra* 83 F.2d at 881.

In summary, the injured shipper carries the burden of proving that cargo in good condition was delivered to the carrier and that the cargo arrived at the destination point in damaged condition. Once the shipper shows this, it has made out a prima facie case of liability against the carrier. The carrier then has the burden of proving either that it exercised due care in handling the cargo, that the damage resulted from an excepted cause under maritime law, or that the damage was excepted by contract. If the carrier proves

one of these, then it has successfully rebutted the shipper's prima facie case. Unless the carrier proves absence of negligence, however, it has not reached a liability-free port. The carrier may still be liable if the shipper proves that negligence was a concurrent cause of the damage to the cargo. If the cargo owner succeeds in showing that negligence was a factor in the damage to the cargo, then the carrier will have the burden of proving the proper allocation of damages between the negligence and the excepted peril. Inability to do this will render the carrier liable for the total damage.

The majority are apparently unconvinced that the previous discussion represents an accurate description of the law. It further believes that placing the burden of proving due diligence on the carrier is in the interests of public policy, "[s]ince the carrier, and not the shipper, ususally has the means of knowing most about the events of the voyage." Maj. op. *supra* at 9, 11. Superior knowledge of relevant facts is often raised as a consideration in allocating the burden of proof; it is, however, seldom the controlling factor. The consideration dwindles into even less significance in view of liberal discovery rules. *See* McCormick on Evidence 787 & n.19 (2d ed. 1972).

I believe that public policy considerations support the existing structure of the law by striking a reasonable balance of responsibilities between the shipper and the maritime common carrier. Reaching the proper balance in this seagoing conundrum has been the posture of the courts and the legislatures that have addressed the problem. *See Wirth Limited v. SS Arcadia Forest*, 537 F.2d 1272, 1276-78 (5th Cir. 1976).

Early admiralty law designated common carriers by water as insurers of the goods they carried, liable for any and all damage unless occasioned by an act of God or the public enemy. *See The Propeller Niagara v. Cordes*, 62 U.S. 7, 23

(1858). In order to protect itself, a carrier would often include additional exceptions from liability in the bill of lading. These were recognized and upheld by the courts unless found contrary to public policy. *See Liverpool & Great Western Steam Co. v. Phenix Insurance Co.* 129 U.S. 397, 441 (1889). Clauses exempting the carrier from liability for negligence were generally not enforced, although this was not the case in all jurisdictions. *Id* at 443-47. In 1893, Congress concluded that the scales had tipped too far in favor of the carriers and passed the Harter Act

> [t]o meet the ever increasing attempts further to limit the liability of the vessel and her owner by inserting in bills of lading stipulations against losses arising from unseaworthiness, bad stowage, negligence, and other causes of liability by which the common-law responsibility of carriers by sea was being frittered away . . . .

The Willdomino, 300 F. 5, 9-10 (3d Cir. 1924), *aff'd* 272 U.S. 718 (1927).

The Harter Act, as one might expect, was an accomplishment of compromise. The first section declared null and void contractual attempts to excuse carriers from liability for negligence in the care and custody of cargo. 46 U.S.C. §190. The second section obligated the carrier to provide a seaworthy vessel or, at least, exercise due diligence in the effort to do so. 46 U.S.C. §191. The seaworthy vessel requirement was a prerequisite to relief under the third section which exempted the carrier from liability for causes that were excepted under the common law or frequently appeared in bills of lading. 46 U.S.C. §192; *see* 27 Tex L. Rev. 525, 526-27 (1949).

In an effort to give greater specificity to the rules and to enhance international uniformity, Congress enacted the Carriage of Goods at Sea Act in 1936. 46 U.S.C. §§1300-1315. Although the act made some substantive changes in the law,

it continued the policy of achieving a balance of responsibility between the shippers and common carriers. *See Wirth Limited v. SS Arcadia Forest, supra* 537 F.2d at 1277-78; 27 Tex. L. Rev. 525, 528-30.

The allocation of the burden of proof adopted by the courts is consistent with the statutory scheme of achieving balance between the parties sought by the Harter Act and COGSA. The shipper need only show the delivery of cargo in good condition to the carrier and the discharge by the carrier of defective cargo. In the tradition of the common law responsibility of carriers of goods, the shipowner will be liable for the loss unless it can prove that the harm was the result of an excepted peril. Failing this, the carrier may still be excused from liability if it proves by a preponderance of the evidence that it exercised due diligence in the care and handling of the cargo. If the carrier shows that it is covered by one of the exceptions, however, it will not be saddled with the additional burden of proving due care. Instead, the burden of producing evidence on this issue rests with the party traditionally obligated affirmatively to prove negligence, the party complaining of the negligent misconduct. If the shipper succeeds in showing negligence, the burden of allocating the damages between the excepted cause and the negligence falls on the party who had control of the goods at all relevant times, the carrier. Thus, the peculiarities of admiralty law and the duties of carriers of goods mesh with traditional tort concepts to establish a fair division of responsibilty for goods carried on water.

B.

Even if the majority were to apply the burden of proof rules as set forth in part IA, *supra*, it still may conclude that the district court judgment should be affirmed because Canal failed to show that the topping incident not only damaged the hull but also contaminated the cargo. A predicate to the shifting of the burden of proof to the cargo owner is proof that the cargo was damaged by an excepted cause, and, according to the majority, this was never accomplished. The majority reads the jury's verdict and responses to the interrogatories to mean that although damage to the barge was caused by an excepted peril, the contamination of the antifreeze resulted solely from the failure of Canal to properly care for the cargo after the incident. The majority states that "the trial judge necessarily implied that there was adequate evidence to support the jury's conclusion." Maj. op., *supra* at 7.[3] The majority's failure to consider the propriety of this implication necessarily implies that it believes there is sufficient evidence to support the jury's conclusion. Although the majority's interpretation of the jury's findings may be understandable, I do not believe that the evidence on the record can support this result.

It is undisputed that the general verdict in favor of Canal established that the cracks and holes in the bottom of the barge occurred as a result of the topping incident at Lock 14, an excepted cause. PPG's position, and presumably that of the majority, is that although a peril of the sea caused the holes in the barge, the ingress of water was slow and the cargo could have been salvaged, but for Canal's negligence. Expert testimony established that the water-soluble antifreeze is heavier than water and would have leaked out of the holes in the barge. Although the leakage was slow, one must necessarily infer that it started immediately after the fractures appeared. Even if PPG's assertion concerning Canal's failure to salvage is true, once it is recognized that the

[3] This implication is contrary to the trial judge's statement to counsel following his supplementary instructions to the jury wherein he stated that "I feel very firmly that there isn't any evidence on which the jury could decide that there was failure to exercise due diligence and due care beyond the topping."

water and antifreeze began mixing immediately after the rupture occurred, Canal has successfully shown that damage to the cargo resulted from an excepted peril and PPG has the burden of proving negligence.[4]

To determine what caused the damage to the cargo, one must focus on the factors that permitted the river water to enter the barge. "[T]he efficient cause of the damage sustained by the rice on board the Folmina must be sought in those conditions or events which caused or permitted the entrance of sea water." *The Folmina*, 212 U.S. 354, 362 (1909). A similar case was before the Ninth Circuit in *United States v. Los Angeles Soap, supra*. A shipment of coconut oil was being transported from Manila to Los Angeles. During the voyage, the ship struck an obstruction in the water causing an undetected leak between the tanks containing coconut oil and fuel oil. The ship went into drydock and although the leak was discovered it was not repaired. In fact, the coconut oil remained in the hold mixing with the fuel oil for another two months until the cargo was delivered. The court's allocation of burden of proof was consistent with that described in the previous section:

> The burden of bringing itself within the exception of the Harter Act by showing that the loss and damage were due in whole or in part to the stranding rests upon the [carrier]. If it establishes that *all* of the shortage and contamination were the result of the stranding, the [carrier] is exempt from liability. If, on the other hand, the [carrier] can show only that *part* of the loss is attributable to the stranding, *and the* [*shipper*] *sustains its burden of proving that the* [*carrier*] *has been guilty of negligence in the care and custody of the cargo*, the further burden of attributing the proper proportion of the entire damage to stranding on the one hand and its own negligence on the other rests upon the [carrier].

Id., 83 F.2d at 882 (emphasis supplied). In *Los Angeles Soap*, the cargo owner succeeded in proving the carrier's negligence.

The significance of the burden of proof in this case is particularly acute. Despite attempts by Canal to show that it acted diligently, the jury chose to reject this offer of proof and found that Canal did not satisfy the burden thrust upon it of proving due care. Had the burden been placed on PPG to establish negligence, however, the opposite result would have ineluctably ensued. The record is barren of any evidence demonstrating lack of due care on the part of Canal. Despite general allegations of Canal's failure to discover the damage to the barge and take steps to salvage the antifreeze, no evidence was presented to show that this could have been done. Reference has been made to "fleeting facilities" that appear between Lock 14 and St. Paul. Yet the evidence established that these would have been insufficient to allow proper inspection of the hull of the barge. In short, PPG failed to satisfy its burden of producing sufficient evidence to establish a jury question on the issue of negligence. Once the jury found that the holes in the barge resulted from an excepted peril, the district court should have entered the general verdict in favor of Canal and denied PPG's motion for judgment n.o.v.

It also appears that had the trial court recognized the proper allocation of burden of proof, the issue of negligence after the topping incident may never have gone to the jury. When conferring with counsel concerning the framing of interrogatories for the jury, the judge said, as I have already indicated, *supra* n.3, that he strongly believed that there was

[4] In a similar case, the Ninth Circuit dealt aptly with the significance of a small leak:

> [T]he appellant's contention that the leak was "insignificant" reminds one of Mercutio's grim comment regarding his mortal wound: "No, 't is not so deep as a well, nor so wide as a churchdoor, but 't is enough; 't will serve."

United States v. Los Angeles Soap, *supra* 83 F.2d at 882.

no evidence on which the jury could decide that there was failure to exercise diligence and due care beyond the topping. He allowed the issue to go to the jury because he did not "want to finally decide" the question. Furthermore, in granting PPG's motion for judgment n.o.v., the court relied heavily on its determination that Canal had the burden of proof:

> [E]ven if it be...assumed arguendo that plaintiff had offered no evidence upon which the jury could decide that there was a failure to exercise due diligence and due care beyond the topping, the interrogatory answers indicate that defendant's testimony was rejected by the jury. With *the burden of persuasion resting on defendant Canal*, the rejection of their evidence warrants a verdict for plaintiff in spite of any failure to affirmatively prove negligence. (Emphasis supplied.)

As the majority must recognize, this bouncing burden of proof renders this case not unlike a tennis match. The shipper has the serve and must put the ball in play by showing that the carrier had accepted good cargo but delivered it damaged. The carrier can return the serve by proving that the damage was caused by an excepted peril. Then, in order to keep the ball in play, the shipper must demonstrate that the damage to the cargo was at least in part attributable to negligence by the carrier. The carrier will lose the point unless it can show the apportionment of damages between the excepted cause and the negligence.

In this case, PPG served the ball in bounds by showing that the antifreeze was sound when loaded but contaminated by the time it reached St. Paul. Canal's return shot was proof that the contamination was caused by holes in the barge resulting from the topping incident. PPG, however, drove the ball into the net when it failed to produce any evidence of negligence on the part of Canal. Thus, the point, game, set, match, and judgment must be Canal's.

II. Other Issues

Because PPG failed to produce any evidence of Canal's negligence, I believe the judgment of the district court should be reversed and judgment entered for the defendant. This renders consideration of the other contentions raised by Canal unnecessary. However, I would like simply to note my disagreement with two additional holdings of the majority.

The majority holds that the insurance provisions of the two contracts are unenforceable as a matter of public policy under the authority of *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955). I believe that the distinction between the insurance clauses and *Bisso* made by the Fifth Circuit in *Fluor Western, Inc. v. G & H Towing Co.*, 447 F.2d 35 (5th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972) and *Twenty Grand Offshore, Inc. v. West India Carriers, Inc.*, 492 F.2d 679 (5th Cir.), *cert. denied*, 419 U.S. 836 (1974), is correct and should be applied to this case.[5]

---

[5] I believe the distinction is sound and applicable to this case because here, unlike *Bisso*, (1) the shipper did not waive its right to recover its losses from any negligent party (recovery would still be allowed, *e.g.*, if the insurer failed to pay); (2) the contract did not in itself provide for the waiver of any rights (right of subrogation would be waived only by subsequent insurance contract); and (3) the contract was not adhesive. As the Fifth Circuit observed:

> Under the circumstances of this case, we must determine whether the *Bisso* doctrine is so encompassing that in instances of fair dealing, with no anti-competitive forces at work, the parties to a towing contract cannot agree to include an insurance clause and thereby reduce the towing rate while not affecting the rights of the tug and barge *inter se*, or eliminate the clause and accomplish the towing at a higher rate. We are of the view that *Bisso* contemplated no such expansive interpretation.

Twenty Grand Offshore, Inc. v. West India Carriers, Inc., *supra* 492 F.2d at 683. I disagree with the majority's assertion, maj. op., *supra* at 14, that the distinction only applies where the tower proves a reduction of its charges on that basis. I am also unconvinced that the insurance clause in the transportation agreement cannot be extended to a delegatee under the contract.

Furthermore, I disagree with the majority's conclusion that the single skin barge REB-1602 was seaworthy as a matter of law. A shipowner's obligation to provide a seaworthy vessel is substantial. *See Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960); *The Plow City*, 122 F.2d 816 (3d Cir. 1941). Seaworthiness is a relative concept that can vary depending on the type of cargo being transported. *See Marshall v. Ove Skou Rederi A/S*, 378 F.2d 193 (5th Cir.), *cert. denied*, 389 U.S. 828 (1967); *Schuylkill Transportation Co. v. Banks*, 152 F.2d 405 (3d Cir. 1945). It is generally a question of fact for the jury, *Mahnich v. Southern Steamship Co.*, 321 U.S. 96 (1944), and should be submitted to the jury if "fair minded men viewing all the facts and the inferences to be drawn from this act, can differ whether the ship and its gear are reasonably fit for service." *Greene v. Vantage Steamship Corp.* 466 F.2d 159, 162 (4th Cir. 1972).

In this case, Canal presented expert testimony suggesting that a single skin barge is unseaworthy for the purpose of carrying a liquid, soluble substance like antifreeze.[6] The witness also testified that the cargo would not have been contaminated if a double skin barge had been used. This is sufficient evidence to raise a jury question and it was error to decide the issue as a matter of law.

For the foregoing reasons, I respectfully dissent.

[6]The expert testified that "valuable water soluble cargo such as ethylene glycol [antifreeze] should be carried only in double skin barges." The trial judge observed "even a layman such as I am would know if there's two layers, punctures in the outer layer wouldn't destroy the cargo."

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 78-1027

PPG INDUSTRIES, INC., a Pennsylvania Corporation

vs.

ASHLAND OIL COMPANY-THOMAS PETROLEUM TRANSIT DIVISION, a Kentucky Corporation

vs.

CANAL BARGE COMPANY, INC. and INLAND RIVER TRANSPORTATION CORPORATION, a corporation and DRAVO CORPORATION

Canal Barge Company, Inc.,

Appellant

(D. C. Civil No. 72-932)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: ROSENN and WEIS, *Circuit Judges*
and FISHER, *District Judge**

*Honorable Clarkson S. Fisher, United States District Court for the District of New Jersey, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on September 28, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed October 17, 1977, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

December 29, 1978

APPENDIX B

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 78-1027

PPG INDUSTRIES, INC., a Pennsylvania Corporation

v.

ASHLAND OIL COMPANY-THOMAS PETROLEUM TRANSIT DIVISION, a Kentucky Corporation

v.

CANAL BARGE COMPANY, INC. and INLAND RIVER TRANSPORTATION CORPORATION, a corporation and DRAVO CORPORATION.

Canal Barge Company, Inc.,

Appellant

SUR PETITION FOR REHEARING

Present: ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, *Circuit Judges* and FISHER, *District Judge.**

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

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*Honorable Clarkson S. Fisher, United States District Court for the District of New Jersey, sitting by designation.

Judges Gibbons and Rosenn would grant the petition for rehearing. Honorable Collins J. Seitz, Chief Judge, did not participate in the consideration of this matter.

By the Court,

/s/ Joseph R. Weis, Jr.,

Judge

Dated: February 5, 1979

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

For The Western District of Pennsylvania

PPG INDUSTRIES, INC.,
a Pennsylvania corporation,
Plaintiff,

v.

CANAL BARGE
COMPANY, INC.,
Defendant and
Third-Party Plaintiff,

and

ASHLAND OIL COMPANY,
a Kentucky corporation,
Third-Party Defendant.

Civil Action
No. 72-932

MEMORANDUM OPINION AND ORDER

Plaintiff entered into a contract with third-party defendant Ashland Oil Co. whereby Ashland agreed to transport a quantity of antifreeze liquid belonging to plaintiff from Beaumont, Texas to St. Paul, Minnesota. Pursuant to this agreement, the antifreeze was loaded into an Ashland barge and towed to Baton Rouge, Louisiana. Ashland entered into a second and separate contract with defendant Canal Barge and agreed to tow the Ashland barge containing the antifreeze from Baton Rouge to its final destination in St. Paul. Somewhere between Beaumont and St. Paul, the cargo of antifreeze liquid was contaminated by water. Plaintiff, therefore, brought this action against Canal to recover the damages it claimed to have sustained as a result of the contamination of its product. Plaintiff contended that defendant Canal was obligated to exercise due care in the operation of

its towboat and in caring for the cargo being towed, and that Canal failed to exercise such due diligence in towing the Ashland barge.

Subsequent to the Court's charge to the jury and during the jury's deliberations, the jury posed the following question to the Court:

> "If in our deliberations we consider that the damage to the barge took place during the topping at Lock 14 and that no negligence existed on the part of the captain and the pilot of the Caroline, must we at that point stop any further deliberations, or can we consider what is believed to be negligence on the parties involved following the topping?"[1]

In response, this Court instructed the jury that:

> "The answer to your question is that you must stop if you find that the damage to the barge took place during that topping at Lock 14, and if you determine that that was due to a peril of the sea and not due to the failure to exericse—any negligence or due care on the part of Canal acting through its personnel, then you must stop any further deliberations, and that you cannot consider any negligence or failure to exercise due care, the burden of proof being on Canal that they did exercise due care and diligence during the rest of the trip following the topping. You cannot consider that at all.
>
> "But I hope you understand that I am charging you, that if you decide that there was no fault in the topping, that Canal has met its burden of proof up to and including anything that occurred at the topping, then that's where you stop."[2]

[1]Tr. of Charge and Jury Question, p. 31-32.

[2]Tr. of Charge and Jury Question, p. 53.

The reason for limiting the jury's review in such a manner was a concern with the ability of the jury to accurately allocate contamination damage between that which might have occurred during the topping and that which might have occurred thereafter. The Court felt that the evidentiary record was incapable of providing support for any split percentage distribution of damages.[3]

The jury returned a verdict in favor of Canal and against plaintiff as to the events up to and including the topping incident.

The Court did, however, also submit three special interrogatories to the jury, which were answered and returned with the verdict. These interrogatories, relating to damage which might have occurred subsequent to the topping, were returned as follows:

> 1. If you determine that Canal has satisfied its burden of showing due diligence up to and including the topping incident at Lock 14, what percentage of the damage to the cargo occurred as a result of the topping, if any, and what percentage occurred from a failure of due care from the time of the topping to the arrival of the REB-1602 in St. Paul?
>
> Topping 0%
> After Topping 100%
>
> 2. Which of the parties, if any, failed to exercise due care from the time of the topping incident to the time of arrival in St. Paul?
>
> Defendant Canal
> (Plaintiff, Defendant, Third-Party Defendant)

[3]Tr. of Charge and Jury Question, pp. 32-33, 35.

3. What was the total amount of damage to the cargo?

$110,000.00[4]

Largely based upon the interrogatory answers, plaintiff has now moved for judgment notwithstanding the verdict or, in the alternative, a new trial.

DISCUSSION

For the reasons hereinafter stated, this Court deems entry of judgment notwithstanding the verdict on behalf of plaintiff in the amount of $110,000.00 to be appropriate.

The purpose of submitting the special interrogatories to the jury was to provide a basis in the record for molding a verdict post trial, if necessary, as stated by this Court:

> "As I see it, by use of this interrogatory, we can, if we are subsequently looking at the record, decide that if the topping was due to peril of the sea, which this interrogatory would tend to indicate they believe, but that there was a failure to prove use of due care during the remainder of the voyage on the part of Canal, then we will have a percentage figure and a damage; and we will have a statement by whom, and we can mold the verdict. . . ."[5]

The interrogatory answers indicate a jury finding that damage to the barge occurred in the topping and thereafter Canal failed to exercise due care in tending to the cargo. The interrogatories further indicate a jury finding that Canal's failure to exercise due care after the topping was the cause of the cargo's contamination. These explicit findings mandate that we now utilize the interrogatory answers in the manner contemplated to grant judgment notwithstanding the verdict.

[4]Exhibit B.

[5]Tr. of Charge and Jury Question, p. 40.

The interrogatory responses are so clearly indicative of judgment in plaintiff's behalf that the only issue still extant is whether or not the jury's responses are supported by evidence of record. The above question must be answered with reference to the applicable burdens of proof in the case *sub judice*.

This Court instructed the jury that the burden of persuasion rested with Canal both as to events up to and including the time of topping and after the topping.[6] In spite of resistance from counsel, this position on the burden of proof was steadfastly adhered to: *"If they considered diligence and due care beyond the topping, I think the burden still remains with you [Canal]."*[7] The burden of persuasion is imposed upon defendant Canal because as a carrier of goods it is essentially an insurer, absolutely liable to the shipper for damages unless occasioned by an excepted cause under the Harter Act. [8]

Defendant Canal argues that it was error to place the burden of proof regarding circumstances subsequent to the topping upon it. Canal contends that *"once the shipowner has sustained its burden of proof that a loss was caused by negligent navigation, or peril of the sea, or any other excepted cause contained in the Harter Act or, where applicable the Carriage of Goods by Sea Act, the burden then shifts to the owner of the cargo to establish that, either the vessel was unseaworthy or that some other negligence which is not an excepted cause, was the sole cause or the concurring cause of the loss." (emphasis added)*[9] Defendant Canal would then apparently urge upon this Court that since the general verdict finds that the events up to and including the

[6]Tr. of Charge and Jury Question, pp. 54-55.

[7]Tr. of Charge and Jury Question, p. 57.

[8]42 U.S.C. §192.

[9]Defendant's brief, p. 10.

topping were due to excepted causes and do not impose liability upon them, those events in some manner taint activity occurring subsequent to the topping so as to shift the burden of persuasion on those subsequent events to the plaintiff. Defendant's position conveniently overlooks the key factor which must be present in order to shift the burden of persuasion; that is a finding that the *loss* was a result of an excepted cause. In the case *sub judice*, the jury found only that damage to the barge was a result of an excepted cause. That defendant did not sustain its burden of proving that the *loss* was caused by an excepted cause is clearly displayed by the interrogatory answers. Defendant's brief therefore, assumes the very point which was in dispute. Thus, the burden of persuasion properly rested with defendant Canal as to the exercise of due diligence subsequent to the topping.[10] See *Clark v. Barnwell*, 53 U.S. 272 (1851); *Nichimen Company v. M.V. Farland*, 426 F.2d 319 (3d Cir. 1972). Since defendant Canal did not satisfy its burden of establishing that it exercised due diligence in caring for the cargo of antifreeze, as evidenced by the interrogatories, judgment notwithstanding the verdict in the amount of $110,000 must be entered on behalf of plaintiff in accordance with the findings of the jury.[11]

[10]Defendant's brief carefully highlights testimony which tends to prove that Canal did in fact exercise due care and diligence. This recitation is of no avail; however, for even if it be further assumed *arguendo* that plaintiff had offered no evidence upon which the jury could decide that there was a failure to exercise due diligence and due care beyond the topping, the interrogatory answers indicate that defendant's testimony was rejected by the jury. With the burden of persuasion resting on defendant Canal, the rejection of their evidence warrants a verdict for plaintiff in spite of any failure to affirmatively prove negligence.

[11]Had the jury decided that a portion of the damages resulted from the topping and a portion thereafter, judgment notwithstanding the verdict might be inappropriate. *Moran Towing Corp. v. M.A. Gammino Construction Co.*, 244 F. Supp. 729 (1965) *vacated and remanded* 363 F.2d 108 (1st Cir. 1966), *on remand* 292 F.Supp. 134 (1968), *affirmed in part and remanded in part* 409 F.2d 917 (1969). However, any concern with an evidentiary basis for apportioning damages was removed when the jury found that all of the cargo damage occurred after the topping.

The last issue to be disposed of is whether or not an award of interest should be added to plaintiff's verdict. While allowance or disallowance of interest is a matter within the sound discretion of this Court, allowance of interest is the general rule in order to make whole the injured party. *Inter-State Steel Corporation v. S.S. "Crystal Gem,"* 317 F.Supp. 112 (S.D. N.Y. 1970) Accordingly, plaintiff is entitled to 6% interest computed from March 30, 1971, the date of the contamination of the cargo.

An appropriate Order will issue.

/s/ HUBERT I. TEITELBAUM

Hubert I. Teitelbaum
United States District Judge

ORDER

AND Now, to-wit, this 17th day of October, 1977, in accordance with the foregoing Opinion, IT IS ORDERED that plaintiff's motion for judgment notwithstanding the verdict be and the same is hereby granted against defendant Canal in the amount of One Hundred Ten thousand and No/100 Dollars ($110,000.00) plus six percent (6%) interest from March 30, 1971.

/s/ HUBERT I. TEITELBAUM

Hubert I. Teitelbaum
United States District Judge

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APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PPG INDUSTRIES, INC.,
a Pennsylvania corporation,
Plaintiff,

v.

CANAL BARGE
COMPANY, INC.,
Defendant and
Third-Party Plaintiff,

and

ASHLAND OIL COMPANY,
a Kentucky corporation,
Third-Party Defendant.

Civil Action
No. 72-932

ORDER

AND Now, this 31st day of March, 1978, upon consideration of defendant and third-party plaintiff Canal Barge Company, Inc.'s motion to alter or amend judgment notwithstanding the verdict in the above-captioned case, IT IS ORDERED that said motion is hereby denied for the reason that even assuming *arguendo* that PPG was contractually bound to maintain insurance coverage for the incident in dispute *sub judice*, the insurance provisions purportedly requiring such coverage are unenforceable as a matter of public policy. *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955); *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*,

372 U.S. 697 (1963). Therefore, the insurance provisions of the transportation agreement and/or the towing contract do not provide Canal a valid defense to PPG's claim.

/s/ HUBERT I. TEITELBAUM

Hubert I. Teitelbaum
United States District Judge

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APPENDIX E

46 U.S.C. §190. Stipulations relieving from liability for negligence

It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss of damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect. Feb. 13, 1893, c. 105, §1, 27 Stat. 445.

46 U.S.C. §191. Stipulations relieving from exercise of due diligence in equipping vessels

It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence[1] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided. Feb. 13, 1893, c. 105, §2, 27, Stat. 445.

[1]Probably should read "to".

46 U.S.C. §192. Limitation of liability for errors of navigation, dangers of the sea and acts of God

If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service. Feb. 13, 1893, c. 105, §3, 27 Stat. 445.

APPENDIX F

46 U.S.C. §1302. Duties and rights of carrier

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title.

Apr. 16, 1936, c. 229 §2, 49 Stat. 1208.

46 U.S.C. §1303. Responsibilities and liabilities of carrier and ship

Seaworthiness

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

Cargo

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

Contents of bill

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the

shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: *Provided*, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

Bill as prima facie evidence

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b), and (c), of this section: *Provided*, That nothing in this chapter shall be construed as repealing or limiting the application of any part of sections 81 to 124 of Title 49.

Guaranty of statements

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

Notice of loss or damage; limitation of actions

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided*, That if a notice of loss or damage, either apparent or concealed, is given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

"Shipped" bill of lading

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill

of lading: *Provided*, That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

Limitation of liability for negligence

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

Apr. 16, 1936, c. 229, §3, 49 Stat. 1208.

48 U.S.C. §1304. Rights and immunites of carrier and ship

Unseaworthiness

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the

burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Uncontrollable causes of loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks:

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Freedom from negligence

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

Deviations

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however,* That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

Amount of liability; valuation of cargo

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary

freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided,* That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

Inflammable, explosive, or dangerous cargo

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

Apr. 16, 1936, c. 229, §4,49 Stat. 1210.